

No. 83-1898

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In the Supreme Court of the United States

OCTOBER TERM, 1984

SEA-LAND SERVICE, INC., PETITIONER

v.

ELIZABETH HANFORD DOLE,
SECRETARY OF TRANSPORTATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 605(c) of the Merchant Marine Act of 1936, 46 U.S.C. (Supp. V) 1175(c), requires the Maritime Subsidy Board, after executing an operating-differential subsidy contract following a hearing, to hold a second hearing before authorizing the subsidized vessels to call on certain ports off the subsidized route.

(I)



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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 723 F.2d 975. The opinion of the district court (Pet. App. 1g-9g) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1983 (Pet. App. 1h-2h). The Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 21, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 605(c) of the Merchant Marine Act of 1936, 46 U.S.C. 1175(c), is set forth in full at Pet. App. 2i. (Section 605(c) was amended in 1981 to substitute the Secretary of

Transportation for the Secretary of Commerce. Pub. L. No. 97-31, § 12, 95 Stat. 162.)

STATEMENT

1. The Merchant Marine Act of 1936 was enacted to foster an efficient, American owned and operated merchant fleet able to carry a substantial portion of American export and import trade, and able to serve as a naval auxiliary in time of war. 46 U.S.C. 1101. To these ends, the Act provides for a variety of subsidy programs designed to enable American ship owners to achieve parity with foreign ship owners with respect to such matters as operating expenses and construction costs. See *Moore-McCormack Lines, Inc. v. United States*, 413 F.2d 568, 571 (Ct. Cl. 1969).

Section 605(c) of the Act, 46 U.S.C. (Supp. V) 1175(c), the provision at issue in this case, is part of subchapter VI, entitled "Operating-Differential Subsidy" (ODS). In granting an ODS, the government contracts to subsidize operations of American flag vessels in return for a commitment on the part of the ship owner (a) to keep the subsidized ships under United States registry for a specified period, (b) to maintain operations on specified routes, and (c) to employ United States citizens. See *Oceanic S.S. Co. v. United States*, 586 F.2d 774, 777 (Ct. Cl. 1978). An applicant seeking an ODS must meet the eligibility requirements of Section 605. In addition, Section 605(c) provides in pertinent part:

No contract shall be made under this subchapter with respect to a vessel to be operated in an essential service served by citizens of the United States which would be in addition to the existing service, or services, unless the Secretary of Transportation shall determine after proper hearing of all parties that the service already provided by vessels of United States registry is inadequate, and that in the accomplishment of the

purposes and policy of this chapter additional vessels should be operated thereon.

The "contract" referred to in Section 605(c) is for the payment of an ODS to an applicant. 46 U.S.C. (Supp. V) 1173(a).

2. In 1973, Waterman Steamship Corporation filed an application that, as amended, sought an ODS on a specified trade route (Trade Route 21) with the privilege of calling on six other specified routes (Pet. App. 1b). In 1975, Waterman filed a separate application for an ODS on these other six trade routes (*ibid.*). Following public notice of these applications, submission of comments in opposition by competing shipping companies including petitioner, and public hearings, an administrative law judge (ALJ) made a Section 605(c) finding that United States flag service on all the requested routes was inadequate and that subsidies would serve the purpose of the Act (Pet. App. 1b-60b). The Maritime Subsidy Board (Board) affirmed the ALJ's finding concerning Trade Route 21, but found that Section 605(c) barred subsidized service on the six other routes (Pet. App. 1c-27c).

Waterman then submitted a revised ODS application which conformed to the Board's final decision by requesting an ODS for Trade Route 21, along with the privilege of making nonsubsidized calls along the six other routes. Noting the Section 605(c) determinations made in its previous decision, the Board then issued a letter approving Waterman's revised application without holding a separate hearing (Pet. App. 11-41*l*). The Board and Waterman entered into an ODS contract in accordance with the terms of the letter (Pet. App. 5a).

Petitioner requested the Board to reconsider the determination embodied in its letter (Pet. App. 1m-10m). Petitioner contended, *inter alia*, that the Board erred in not

holding a second Section 605(c) hearing before approving the nonsubsidized service (Pet. App. 5m-8m). The Board denied petitioner's request (Pet. App. 1e-4e), and the Secretary of Commerce denied review (Pet. App. 1f).

3. Petitioner then filed this action in the United States District Court for the District of Columbia alleging, *inter alia*, that it was denied its statutory right to a hearing under Section 605(c) when the Maritime Subsidy Board allowed Waterman to conduct nonsubsidized operations over the six trade routes for which a subsidy had been denied following the initial Section 605(c) hearing. The district court granted summary judgment in favor of the respondents (Pet. App. 1g-11g). Noting that Section 605(c) refers to contracts made "under this subchapter," and that the subchapter is entitled "Operating-Differential Subsidy," the court concluded that the Section 605(c) hearing requirement applies only to subsidized operations (Pet. App. 6g).

The court of appeals affirmed (Pet. App. 1a-9a). The court noted at the outset that its task was "not to provide [its] own original construction of the governing statute, but rather to determine whether the agency's construction is 'sufficiently reasonable' to be allowed" (*id.* at 7a, citing *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 70 (1975)). The court concluded that the Board's position that a separate hearing is not required before the Board may approve nonsubsidized traffic is consistent with the language of Section 605(c), with the statute's underlying policy to avoid subsidizing adequately served routes, and with the Board's prior decisions (Pet. App. 7a-9a).

ARGUMENT

The decision of the court of appeals is correct and, this being a case of first impression, does not conflict with the

decision of any other court. Accordingly, further review is not warranted.

Petitioner contends (Pet. 9-21) that the court of appeals erred in upholding the Maritime Subsidy Board's interpretation of Section 605 as "sufficiently reasonable." Petitioner, however, ignores the fact that the court of appeals reached its conclusion only after determining that the Board's interpretation was consistent with the statutory language and purpose.

It is well settled that when faced with a problem of statutory construction, a reviewing court must ordinarily accord great deference to the interpretation of the statute by the agency charged with its implementation. See, e.g., *Udall v. Tallman*, 380 U.S. 1, 16 (1965). As this Court recently explained in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 4-5 (footnotes omitted):

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

This Court has recognized that the Secretary has substantial discretion in administering the ODS program. *Seatrail Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 586 (1980). In its decision below, the court of appeals, after examining the language and purpose of the statute, properly upheld the reasonable administrative construction of Section 605(c). That construction is consistent with, if not compelled by, the statutory language. The introductory clause of Section 605(c) states: "No contract shall be made under this subchapter with respect to a vessel to be operated in an essential service [without proper hearing]." 46 U.S.C. (Supp. V) 1175(c). As the district court recognized (Pet. App. 6g), the phrase "under this subchapter" plainly refers to contracts for subsidized routes because Section 605(c) is found in subchapter VI, entitled "Operating-Differential Subsidy." Contracts for an ODS subsidize shipping operations over certain specified trade routes deemed to be "an essential service." 46 U.S.C. (Supp. V) 1173(a), 1175(c). It follows from the language of Section 605(c) that the statutory hearing requirement applies only with respect to those subsidized shipping operations.

Petitioner argues (Pet. 17-20) that the Maritime Administration's General Order 80, 46 C.F.R. 281.11 (reprinted at Pet. App. 1j-7j), is evidence that the agency has interpreted Section 605(c) to apply to nonsubsidized operations. The court of appeals correctly rejected this contention (Pet. App. 8a). By its terms, General Order 80 "do[es] not apply to * * * [n]on-subsidized voyages specifically authorized by the operation-differential subsidy contract of the operator." 46 C.F.R. 281.11(b) (Pet. App. 1j). If such operations are not so authorized, the subsidized operator must apply to the Maritime Administrator for approval. 46 C.F.R. 281.11(a), 281.12(a) (Pet. App. 1j, 3j-4j). The Administrator, in his discretion, may hold an informal hearing regarding the proposal to allow additional nonsubsidized service. 46 C.F.R. 281.13(a) (Pet. App. 4j-5j). However, "[t]he hearing

is not only optional but is stated to be 'for advisory purposes only' " (Pet. App. 8a). General Order 80 therefore establishes a framework for the Administrator to consider a request regarding nonsubsidized operations when such consideration has not already taken place in the context of an individual ODS contract. As the court of appeals concluded (Pet. App. 8a), the inclusion of a discretionary hearing provision in this regulatory scheme undercuts, rather than supports, petitioner's argument. Indeed, if the Maritime Administration had interpreted Section 605(c) to apply to nonsubsidized operations and to *require* a hearing, there would have been no need to promulgate General Order 80, which permits nonsubsidized operations to be approved without any hearing at all.

Contrary to petitioner's contention (Pet. 28), the purpose of Section 605(c) is not to prevent overtonnaging on both subsidized and nonsubsidized routes. In *Sea-Land Service, Inc. v. Kreps*, 566 F.2d 763, 774 (D.C. Cir. 1977) (emphasis added; footnote omitted), the court of appeals recognized that "[S]ection 605(c) is primarily designed to avoid *subsidizing* a trade when the trade is already adequately served by U.S.-flag carriers, *i.e.*, overtonnaging." Congress intended Section 605(c) as a protective device to insure proper use of public funds. The danger of overtonnaging is therefore relevant under Section 605(c) only insofar as the Board is considering the possible expenditure of public funds in the form of an ODS.

The fundamental error of petitioner's broad interpretation of Section 605(c) is made manifest by examining its practical consequences. The immediate goal of a Section 605(c) hearing is to enable the Board to make the "inadequacy" and "purposes and policy" determinations mandated by the statute. These determinations provide, in turn, the basis for the Board's decision whether an ODS award is barred. Where, as here, subsidization of Waterman's operations on the six other trade routes had previously been the

subject of a hearing and had been denied, holding a second hearing at which a subsidy would not be an issue would be an exercise in futility given the purpose of the statute.¹

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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¹In any event, as the court of appeals concluded (Pet. App. 7a-8a; emphasis in original), even assuming, as petitioner contends,

that the purpose of the statutory scheme is not merely to prevent subsidies from *causing* overtonnaging of essential service routes, but also to use subsidies to *prevent* overtonnaging of such routes (by prohibiting unneeded service by vessels subsidized for other routes) * * *, it is still reasonable to believe that the former policy, being the stronger and more explicit, was meant to be implemented through mandatory public hearings under § 605(c), whereas the latter was left to be implemented through discretionary hearings and more informal means. The position that the hearing requirement does not apply to nonsubsidized operations is supported by the fact those operations go unaddressed in all the other provisions of this subchapter.